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No. 03-1574

In The Supreme Court of the United States

BOBBY JOE WINCE, in his individual capacity; JOHN DOLAN, in his individual capacity; and THOMAS DUSING, in his individual capacity,

Petitioners,

v.

SUSAN STEMLER, WILLIAM CHIPMAN, Administrator of the Estate of CONNI BLACK, and RANDY BLACK, Legal Guardian of Shianne Black,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The *Rooker-Feldman* doctrine provides that lower federal courts must refrain from adjudicating federal claims that are inextricably intertwined with issues decided in state court proceedings. In this case, the Kentucky Supreme Court ruled that the defendant police officers did not owe a duty to Conni Black, and consequently, could not be found negligent under Kentucky law for failing to protect Black from injuries she sustained as a passenger in a drunken driving accident that occurred after Black left the scene of a traffic stop with an intoxicated driver. The basis for the Kentucky Supreme Court's ruling was the Court's determination that Black was never in the custody of police officers during the traffic stop, and Kentucky law does not impose a duty on police officers to protect citizens in the absence of a custodial relationship. In deciding that Black's estate could pursue a federal substantive due process claim against the police officers for failing to protect Black, a claim which also hinges on the issue whether Black was in police custody during the traffic stop, did the Sixth Circuit adjudicate a federal claim that is inextricably intertwined with an issue previously decided in state court proceedings, in contravention of the *Rooker-Feldman* doctrine?

2. Black's estate and Stemler filed lawsuits in Kentucky state court alleging claims under state law based on the traffic stop, and subsequently filed actions in federal court asserting federal claims arising from the very same traffic stop. In the face of clear Kentucky precedent holding that two causes of action arising from the same nucleus of facts are "the same" for purposes of claim preclusion and must

QUESTIONS PRESENTED FOR REVIEW – Continued

be asserted in the same proceeding, the Sixth Circuit ruled that Black's estate and Stemler were not precluded from splitting their causes of action between federal and state court. Was the Sixth Circuit's ruling erroneous, and, further, did the Sixth Circuit err in failing to certify the question to the Kentucky Supreme Court?

PARTIES

The caption of the case contains the names of all parties to the proceeding: Bobby Joe Wince; Thomas Dusing; John Dolan; William Chipman, Administrator of the Estate of Conni Black; and Susan Stemler; and Randy Black, Legal Guardian of Shianne Black.

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PETITION FOR WRIT OF CERTIORARI

Bobby Joe Wince, Thomas Dusing, and John Dolan respectfully petition the United States Supreme Court for a Writ of Certiorari to review the Opinion of the U.S. Court of Appeals for the Sixth Circuit entered on December 2, 2003.

OPINIONS BELOW

The decision advanced for review is reported as *Stemler v. City of Florence*, 350 F.3d 578 (CA6 2003), and is attached in the Appendix, *infra*, pp. 1a-23a. A Petition for Rehearing was denied on February 20, 2004, in an unreported decision which is attached in the Appendix, *infra*, pp. 37a-38a. The decisions of the U.S. District Court for the Eastern District of Kentucky are not reported and are attached in the Appendix, *infra*, pp. 26a-31a and 32a-36a.

JURISDICTION

The Opinion of the U.S. Court of Appeals for the Sixth Circuit was entered on December 2, 2003. (App. 1a-23a) On February 20, 2004, the Court of Appeals denied a timely Petition for Rehearing. (App. 37a-38a) Pursuant to Supreme Court Rules 13.1 and 13.3, this Petition has been filed within ninety (90) days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

On February 19, 1994, Conni Black had an argument with her boyfriend, Steve Kritis, at a bar and left in a car driven by Susan Stemler. Kritis began chasing the pair in his own vehicle until City of Florence police officers and Boone County Sheriff's Deputies, having been alerted to the chase by a concerned citizen, stopped both vehicles. At

the conclusion of the traffic stop, Black voluntarily left with Kritis in his vehicle, while Stemler was arrested for driving under the influence of alcohol.

A few minutes after leaving the scene of the traffic stop, Black and Kritis began to argue. Black struck Kritis with a drywall tool she found in the front seat of Kritis' vehicle, and Kritis retaliated by striking Black. While fighting with Black, Kritis lost control of his vehicle and struck a guardrail, killing Black. Officers who responded to the accident found Kritis to be intoxicated and arrested him for driving under the influence of alcohol.

Based on these facts, Black's estate and Stemler each initiated (and simultaneously prosecuted) complaints in state court and in federal district court, resulting in a total of four legal actions revolving around the same nucleus of facts.

B. PROCEEDINGS BELOW

1. The State Court Proceedings

On March 7, 1994, William Chipman, the administrator of Black's estate, filed a complaint in the Boone Circuit Court against the City of Florence, Kentucky; the three Florence police officers who were at the scene of the traffic stop, Bobby Joe Wince, Thomas Dusing, and John Dolan; Boone County, Kentucky; Boone County Sheriff Ron Kenner; and two Boone County deputies who were also at the scene of the traffic stop, Chris Alsip and Rob Reuthe. On behalf of Black's estate, Chipman asserted that the officers and their respective municipal employers were liable for negligence in connection with Black's death.

On May 20, 1994, Stemler filed a complaint in state court against the City of Florence, Wince, Dusing and

Dolan. She alleged that the officers and their respective municipal employers were liable for malicious prosecution, false arrest and imprisonment, abuse of process, assault and battery, and negligent or intentional infliction of severe emotional distress.

The Boone Circuit Court consolidated the cases.

In April 1996, after extensive discovery, the Boone Circuit Court granted summary judgment to all defendants on all the claims presented by the two complaints, except for Stemler's assault and battery claim against Wince. Stemler later dismissed that claim voluntarily.

On appeal, the Kentucky Court of Appeals reversed in part the decision of the Boone Circuit Court, ruling that summary judgment had been improperly granted on Chipman's negligence claim. However, the appellate court affirmed the circuit court's decision granting summary judgment to defendants on Stemler's claims. Stemler did not appeal further.

On February 22, 2001, the Kentucky Supreme Court reversed the decision of the Kentucky Court of Appeals and reinstated the decision of the Boone Circuit Court. The Kentucky Supreme Court determined, based on a careful analysis of the well-documented facts, that there was no evidence Black had been in police custody at any time on the night of her death.[1] Therefore, the Kentucky Supreme Court found that no "special relationship" existed and that the defendants had no common law duty to

---

[1] In Kentucky, a police officer has no common law duty to protect a citizen from injuries caused by a third person unless a "special relationship" exists between the officer and the citizen. A "special relationship" arises when an officer places the citizen in custody or otherwise restrains the citizen. *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. App. 1992); *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995).

protect Black from the harm caused by Kritis. Moreover, the Kentucky Supreme Court ruled that, even if a "special relationship" existed, the fight between Black and Kritis was a superceding event that destroyed the causal connection between the defendant officers' conduct and the harm which befell Black. Thus, the Kentucky Supreme Court ruled that it was appropriate to grant summary judgment to defendants on Chipman's negligence claim.

2. Simultaneous Federal Court Proceedings

On March 31, 1994, Chipman filed a complaint in the U.S. District Court for the Eastern District of Kentucky against the same defendants designated in his state court action. Based on the same facts that gave rise to his state court action, Chipman asserted that the officers and their respective municipal employers violated Black's constitutional right to substantive due process in connection with her death. On August 2, 1994, the district court granted the individual officers' motion to dismiss under Civil Rule 12(b)(6) on the ground of qualified immunity. On July 3, 1996, the district court granted the City of Florence's and Boone County's motions for summary judgment.

In the interim, on January 24, 1995, Stemler filed a complaint in district court against the same defendants designated in the action she had previously filed in state court. Based on the same facts that gave rise to her state court action, Stemler alleged that the officers and their respective municipal employers deprived her of equal protection of the law and used excessive force in arresting her, in violation of the Fourth Amendment. On October 6, 1995, the district court granted the individual officers' motion to dismiss on the basis of qualified immunity. On July 3, 1996, after consolidating Stemler's case with

Chipman's, the federal district court awarded summary judgment to the City of Florence and Boone County.

Chipman and Stemler appealed the federal district court's decisions to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit upheld the district court's dismissal of Chipman's and Stemler's claims against the City of Florence and Boone County. However, the Sixth Circuit reversed the district court's dismissal of Chipman's claim against the individual officers. In addition, the Sixth Circuit ruled that the federal district court should not have dismissed Stemler's equal protection claim, and upheld its refusal to dismiss her claim for excessive force against the individual officers. As a result, the Sixth Circuit remanded the case to the district court for consideration of the remaining claims. Shortly thereafter, Stemler amended her Complaint to allege that Wince had fabricated evidence against her.

Subsequently, the district court ordered the cases held in abeyance pending a decision by the Kentucky Supreme Court regarding the propriety of the Boone Circuit Court's decision granting summary judgment in favor of defendants on Chipman's negligence claim in the state court proceeding. Ultimately, the Kentucky Supreme Court ruled that the Boone Circuit Court had been correct in granting summary judgment in the defendants' favor in the state law action. Importantly, the Kentucky Supreme Court determined that Black had not been in police "custody" on the night of her death and that, as a result, the officers had no common law duty to protect her from the injuries inflicted on her by Kritis.

Following the Kentucky Supreme Court's decision, the federal district court granted summary judgment to the officers on Chipman's substantive due process claim. In so

doing, the district court ruled that the issue whether Black was in "custody" could not be relitigated on *res judicata* grounds. Although the defendant officers argued that the *Rooker-Feldman* doctrine also barred Chipman from pursuing his federal claims, the district court did not address that argument in its Order.

On appeal, the Sixth Circuit reversed the district court's decision, finding that the Kentucky Supreme Court's determination that Black was not in custody was not essential to that Court's holding. As such, the Sixth Circuit refused to afford preclusive effect to the Kentucky Supreme Court's decision. The Sixth Circuit also rejected the defendant officers' argument that *Rooker-Feldman* barred Chipman's federal claims.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. CERTIORARI IS WARRANTED TO PROVIDE CRITICAL GUIDANCE TO LOWER FEDERAL COURTS CONCERNING THE PROPER SCOPE AND APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE

This Court has had few occasions to address the *Rooker-Feldman* doctrine. In that regard, this Court has mentioned the doctrine just four times, in *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989); and *Verizon Maryland, Inc. v. Public Service Comm'n of Md.*, 535 U.S. 635 (2002). At the same time, however, consideration of the doctrine has experienced "explosive growth" in the lower federal courts. *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1088 (1999). As a result of the sparse guidance

available from this Court regarding the *Rooker-Feldman* doctrine, lower courts have struggled to define and apply the doctrine consistently, and commentators and attorneys have struggled to interpret it. As one district court said:

> . . . the court acknowledges the comments of Professor Bandes in a symposium on the doctrine: "A review of many of the lower court opinions reflects that the lower courts, in attempting to delineate the doctrine's scope, have spawned a complex, confusing, and sometimes contradictory body of precedent." Amen.

Network Towers, LLC v. Town of Hagerstown, 2002 WL 1364156 (S.D.Ind.) (citation omitted). *See also Brokaw v. Weaver*, 305 F.3d 660 (CA7 2002); *Gottfried v. Med. Planning Servs. Inc.*, 142 F.3d 326 (CA6 1998); *Bates v. Jones*, 131 F.3d 843 (CA9 1997); *Harris v. N.Y. State Dept. of Health*, 202 F.Supp.2d 143 (S.D.N.Y. 2002); *Zealy v. City of Waukesha*, 153 F.Supp.2d 143 (S.D.N.Y. 2001).

For instance, the judiciary and the legal profession have had difficulty defining the relationship of *Rooker-Feldman* to other preclusionary and abstention doctrines, such as *res judicata* and *Younger*, and have reached contradictory conclusions in that regard. *See Robinson v. Ariyoshi*, 753 F.2d 1468 (CA9 1986) (concluding *Rooker-Feldman* is co-extensive with *res judicata*); *Garry v. Geils*, 82 F.3d 1362 (CA7 1996) ("*res judicata* and the *Rooker-Feldman* doctrine are not co-extensive"); *Valenti v. Mitchell*, 962 F.3d 288 (CA3 1992); and *Charchenko v. City of Stillwater*, 47 F.3d 981 (CA8 1995) (noting *Rooker-Feldman* and preclusion principles are extremely similar).

The legal profession has also struggled to identify the purpose and role of the *Rooker-Feldman* doctrine, given its overlap with other preclusionary and abstention doctrines. *See e.g.*, Rachel Thomas Rowley, *The Rooker-Feldman*

Doctrine: A Mere Superfluous Nuance or a Vital Civil Procedure Doctrine?, 78 Denv. U. L. Rev. 321 (2000); Adam McLain, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. Pa. L. Rev. 1555 (2001).

Of particular importance, however, is the difficulty lower federal courts have had in applying the *Rooker-Feldman* doctrine's "inextricably intertwined" formula in order to determine when they lack jurisdiction to hear cases. The "inextricably intertwined" formula requires federal courts to determine not only which claims were decided in state court, but also to identify claims that were not necessarily decided in state court but which are, nonetheless, "inextricably intertwined" with the decided claims. This Court's decision in *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983), provides little guidance to lower federal courts charged with that responsibility, and only one other case decided by this Court has addressed the issue. Specifically, in his concurrence in *Pennzoil*, *supra*, Justice Marshall said "a federal claim is inextricably intertwined . . . if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Id.* at 25. Justice Marshall's statement has proven difficult for lower courts to apply, resulting in inconsistent holdings, sometimes within a single federal circuit.

For example, in *Stern v. Nix*, 840 F.2d 208 (CA3 1988), the Third Circuit described an action attacking a Pennsylvania Supreme Court rule as a "skillful attempt to mask the true purpose of the action", which the court said was to void the state court's judgment. In that case, the Third Circuit applied *Rooker-Feldman* as a bar to the federal court proceeding. Yet, under nearly identical circumstances, the Third Circuit allowed a generalized constitutional

challenge to the same Pennsylvania Supreme Court rule to proceed in *Centifanti v. Nix*, 865 F.2d 1422 (CA3 1989).

In a case similar to *Centifanti*, the Tenth Circuit reversed a district court's invocation of *Rooker-Feldman* as a jurisdictional bar. *Razatos v. Colorado Supreme Ct.*, 746 F.2d 1429 (CA10 1984). In so doing, the Tenth Circuit said that the plaintiff's constitutional challenge to a lawyer discipline rule was not "inextricably intertwined" with the decision of the Colorado Supreme Court because the federal court did not need to review the decision of the state court in order to evaluate the plaintiff's claim. *Id.*

Lower federal courts have also struggled to apply *Rooker-Feldman* in other contexts. For example, in *Centres v. Town of Brookfield*, 148 F.3d 699 (CA7 1998), the state court upheld a local zoning board's denial of a building permit and the plaintiff brought a takings claim in federal court. The Seventh Circuit decided that *Rooker-Feldman* was inapplicable because the plaintiff was complaining of an injury at the hands of the zoning board rather than at the hands of the state court. On that basis, the Seventh Circuit ruled that plaintiff's federal claim was not "inextricably intertwined" with the state court decision and could therefore proceed. On the other hand, in *Garry*, *supra*, the state court granted a condemnation order and plaintiffs sued in federal court alleging the order had been politically motivated. The Seventh Circuit ruled the federal suit barred by *Rooker-Feldman*. The court reasoned that the injury only became complete when the state ordered the condemnation, and that the plaintiff's injury was thus "inextricably intertwined" with the state court judgment.

The basic disagreement among lower federal courts concerns the breadth of the "inextricably intertwined"

formula. A recent Ninth Circuit decision aptly illustrates the disagreement among lower federal courts in this regard:

> If issues presented in a federal suit are "inextricably intertwined" with issues presented in a forbidden de facto appeal from a state court decision, *Rooker-Feldman* dictates that those intertwined issues may not be litigated. . . . But the issues in Kougasian's four causes of action are not "inextricably intertwined" within the meaning of *Rooker-Feldman*. In an ordinary language sense, the issues in Kougasian's claims are indeed "inextricably intertwined" with the issues in *Kougasian I* and *II*. But, as we explained in *Noel v. Hall*, "inextricably intertwined" has a narrow and specialized meaning in the *Rooker-Feldman* doctrine. . . .
>
> Some of our sister circuits have read the "inextricably intertwined" language of *Rooker-Feldman* more broadly. . . . Such a broad meaning of the phrase "inextricably intertwined," however, is not warranted by the Supreme Court's decision in *Feldman*, where the phrase originated. Nor is it warranted by the function of the *Rooker-Feldman* doctrine in our federal system. As applied in *Feldman*, the "inextricably intertwined" test was used to prevent Feldman, the federal plaintiff, from raising, in the non-appeal part of his suit, issues that he was prevented from litigating in his forbidden de facto appeal. In that setting, the "inextricably intertwined" test made good sense, for it prevented Feldman from making an end-run around the rule against de facto appeals. But the "inextricably intertwined" test does not mean that a federal plaintiff can never raise issues that are "inextricably intertwined" with issues already decided in completed state court litigation.

> If that were so, *Rooker-Feldman* would in some cases give greater preclusive effect to state court judgments than the states themselves would give those judgments. Such super-preclusive effect would violate the requirement of 28 U.S.C. § 1738 that federal courts give the same (not more and not less) preclusive effect the rendering state courts would give to those judgments. . . . Similarly, if the "inextricably intertwined" test means that a federal plaintiff cannot raise issues that are "inextricably intertwined" with issues raised in simultaneous ongoing state court litigation, *Rooker-Feldman* would prevent the parallel state and federal litigation that is one of the hallmarks of our federal system . . .

Kougasian v. TMSL, Inc., 359 F.3d 1136 (CA9 2004) (citations omitted).

The Ninth Circuit's narrow interpretation of "inextricably intertwined" is consistent with that of some other circuits, but at odds with that of others. In that regard, the Third and Tenth Circuits take a similarly conservative view of "inextricably intertwined". *See e.g.*, *Bass v. Butler*, 224 F.Supp.2d 950 (E.D. Pa. 2002); *Parkview Assoc. Partnership v. City of Lebanon*, 225 F.3d 321 (CA3 2000); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163 (CA10 1998); *Weis Builders, Inc. v. Kay S. Brown Living Trust*, 236 F.Supp.2d 1197 (D. Colo. 2002).

On the other hand, the Second Circuit has adopted a broader interpretation of "inextricably intertwined", saying:

> "inextricably intertwined" means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred

> under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion.

Moccio v. N.Y. State Office of Ct. Adm., 95 F.3d 195 (CA2 1996). The Second Circuit's broad interpretation of "inextricably intertwined" is shared by the First, Seventh, Eighth and Eleventh Circuits. *See Wang v. N.H. Bd. of Regist. in Med.*, 55 F.3d 698 (CA1 1995); *Johnson v. Supreme Ct. of Ill.*, 165 F.3d 1140 (CA7 1999); *Bechtold v. City of Rosemount*, 104 F.3d 1062 (CA8 1997); *Blue Cross & Blue Shield of Md., Inc. v. Weiner*, 868 F.2d 1550 (CA11 1989).

This case presents the ideal vehicle for the Court to provide guidance on the scope and proper application of the *Rooker-Feldman* doctrine and to establish the contours of the "inextricably intertwined" formula. As such, Petitioners respectfully request that the Court grant certiorari to review the Sixth Circuit's clearly erroneous decision.

II. THE SIXTH CIRCUIT'S REFUSAL TO APPLY THE *ROOKER-FELDMAN* DOCTRINE IS AN OPEN INVITATION FOR PARTIES TO SPLIT THEIR CAUSES OF ACTION BETWEEN STATE AND FEDERAL COURTS, IN DEROGATION OF WELL-ESTABLISHED PUBLIC POLICIES

A. Because Chipman's substantive due process claim only succeeds to the extent that the Kentucky Supreme Court was wrong in deciding Black was not in custody, the Sixth Circuit should have abstained under the *Rooker-Feldman* doctrine.

The Sixth Circuit addressed issues which had previously been decided by the Kentucky Supreme Court. In so doing, the Sixth Circuit adjudicated federal claims that are inextricably intertwined with issues previously decided by

the Kentucky Supreme Court, in direct contravention of the *Rooker-Feldman* doctrine.

Under the *Rooker-Feldman* doctrine, lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate federal claims which are "inextricably intertwined" with issues decided in state court proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Feldman, supra*; *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386 (CA6 2002). For purposes of the *Rooker-Feldman* doctrine:

> The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil, supra; *Keene Corp. v. Cass*, 908 F.2d 293 (CA8 1990); *Catz v. Chalker*, 142 F.3d 279 (CA6 1998).

By this standard, the Sixth Circuit should have abstained from ruling on Chipman's federal claim. Chipman's federal and state claims are inextricably intertwined such that the federal claim could only succeed to the extent that the judgment of the Kentucky Supreme Court is wrong.

Specifically, Chipman asserted a federal claim, pursuant to 42 U.S.C. §1983, alleging that the individual officers deprived Black of her constitutional right to substantive due process. In that regard, Chipman argued that the officers failed to protect Black, inasmuch as they did not prevent her from leaving the scene of the traffic stop with

the intoxicated Kritis. The elements of Chipman's claim are well-established under federal case law:

> The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [a person's] freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

DeShaney v. Winnebago Co. Dept. of Social Services, 489 U.S. 189 (1989); *Cherrington v. Skeeter*, 344 F.3d 631 (CA6 2003). In other words, for purposes of Chipman's federal claim, the pivotal issue in determining whether the officers had a constitutional duty to protect Black from Kritis is whether Black was in custody during the traffic stop.

That very issue was also essential to Chipman's state law negligence claim. Under Kentucky law, a police officer has no affirmative duty to protect a citizen from injuries perpetrated by a third person in the absence of a "special relationship" between the police officer and the citizen. A "special relationship" exists if the citizen is "in state custody or otherwise restrained by the state at the time in question". *Asiby, supra*; *Fryman, supra*.

The critical analyses of Chipman's federal and state claims involve precisely the same issue, i.e., whether Black was in custody when she left the scene of the traffic stop with Kritis. In its February 22, 2001, Opinion, the Kentucky Supreme Court addressed that issue:

> Black remained in the Stemler automobile during the traffic investigation stop and she asked to

> leave the scene with Kritis. She also walked on her own to the Kritis truck despite being intoxicated. She was not physically placed in the vehicle by any of the officers and she was not given a threat by any of the officers either to leave with Kritis or face arrest. The consequence is that Black *was never in custody* or otherwise restrained so as to give rise to a special relationship between the police officers and Black. . . . *The record indicates that the police officers did not exercise sufficient control over Black to establish that she was in custody.* The fact that she was a passenger in a motor vehicle stopped in a police investigation did not establish custody. The evidence indicates that the officers did not make any threat of arrest to Black or in any way attempt to coerce her decision as to how she would leave the scene of the traffic investigation. Black repeatedly requested that she be allowed to leave the scene with Kritis, her boyfriend. She walked unassisted to the Kritis truck and thanked an officer for his courtesy in holding the door for her.

City of Florence v. Chipman, 38 S.W.3d 387, 392-393 (emphasis added).

The Sixth Circuit's subsequent adjudication of that very same issue, was nothing more than a determination that the Kentucky Supreme Court was wrong. Indeed, Chipman's argument before the Sixth Circuit was premised on the assumption that the Kentucky Supreme Court's decision was wrong. In that regard, Chipman maintained:

> " . . . the Kentucky Supreme Court, in a 6 to 1 decision, made numerous incorrect conclusions."
>
> " . . . It is devastating to counsel and his clients that the Kentucky Supreme Court can not only

> be so wrong, but not properly cite the record from the Sixth Circuit."
>
> " . . . the Kentucky Supreme Court issued a ruling with all due respect to that Court, devoid of the reality of what the Sixth Circuit reviewed."
>
> " . . . the Kentucky Supreme Court decision was clearly erroneous and works a manifest injustice."

Amended Final First Brief of Appellants / Cross-Appellants, pp. 5, 13, 23-24, 28. In addition, Chipman refers to the Kentucky Supreme Court opinion as a "bad decision". *Id.* at p. 27.

There can be no question that the Sixth Circuit infringed upon the *Rooker-Feldman* doctrine when it "overruled" the Kentucky Supreme Court's decision that Black was not in custody during the traffic stop.

B. The Sixth Circuit's decision is an open invitation for parties to split their claims between federal and state courts, in derogation of the principals underlying the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine is derived from two U.S. Supreme Court cases decided nearly sixty years apart. *See Feldman, supra*; *Rooker, supra*. According to the *Rooker-Feldman* doctrine, "a U.S. District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the U.S. Supreme Court]." *Powell v. Powell*, 80 F.3d 464 (CA11 1996). The doctrine expresses the principle that federal courts are courts of original jurisdiction that do not sit in an appellate capacity with respect to state courts. *See* 28 U.S.C. §1331; 28 U.S.C. §1257.

The *Rooker-Feldman* doctrine is grounded in federalism, comity and the premise that state courts are not inferior to federal courts. In that regard, courts have noted:

> In our federal system, a state trial court's interpretation of federal law is no less authoritative that that of the federal court of appeals in whose circuit the trial court is located.

Powell, supra; *Lockhart v. Fretwell*, 506 U.S. 364 (1993). In the same vein, the Fourth Circuit said:

> The *Rooker-Feldman* doctrine preserves a fundamental tenet in our system of federalism that, with the exception of habeas cases, appellate review of state court decisions occurs first within the state appellate system and then in the United States Supreme Court. . . . A litigant may not circumvent these jurisdictional mandates by instituting a federal action which, although not styled as an appeal, 'amounts to nothing more than an attempt to seek review of [the state court's] decision by a lower federal court' . . . . For purposes of *Rooker-Feldman*, 'the controlling question . . . is whether a party seeks the federal district court to review a state court decision and thus pass upon the merits of that state court decision.'

Amer. Reliable Ins. Co. v. Stillwell, 336 F.3d 311 (CA4 2003) (citations omitted).

In addition, like other preclusion doctrines, the *Rooker-Feldman* doctrine serves the important purpose of "ensuring that litigants do not take multiple bites at the same apple. Once litigants' claims have been adjudicated in the state court system, they should not have access to the entire federal court system." *Guarino v. Larsen*, 11 F.3d 1151 (CA3 1993).

The Sixth Circuit's decision allowing Chipman's federal claim to proceed – even though the issues dispositive of his federal claims have been fully and finally adjudicated in the Kentucky court system – strikes at the very purposes of the *Rooker-Feldman* doctrine. The decision sends a message that the Kentucky courts did an inadequate job of deciding whether Black was in custody during the traffic stop. The decision allows Chipman to have two "bites at the apple" with potentially contradictory results. But more importantly, the decision provides precedent upon which future litigants will no doubt rely to forum-shop, split causes of action and secure multiple trials of claims that arise out of the same set of facts.

In the interest of preserving the *Rooker-Feldman* doctrine and the purposes underlying it, Petitioners respectfully request that the Court grant certiorari to review the Sixth Circuit's clearly erroneous decision.

III. THE SIXTH CIRCUIT'S GROSS MISAPPLICATION OF KENTUCKY LAW DEFINING WHAT CONSTITUTES "THE SAME CAUSE OF ACTION" FOR PURPOSES OF CLAIM PRECLUSION ANALYSIS FLIES IN THE FACE OF KENTUCKY'S LONG-ESTABLISHED PUBLIC POLICY

The U.S. Supreme Court has held that the same preclusion principles govern a §1983 action as any other kind of action. *Allen v. McCurry*, 449 U.S. 90 (1980); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984). The preclusive effect of a prior state decision is normally determined by state law, and a federal court must give the same preclusive effect to state decisions as would the state court. *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982); *Marrese v. Amer. Acad. of Orthopaedic*

Surgeons, 470 U.S. 370 (1985). The rule that a federal court must follow state law in evaluating the preclusive effect of a state court judgment is rooted in the "Full Faith and Credit" Clause of Article IV, Section 1, of the U.S. Constitution, and 28 U.S.C. §1738, which requires "federal courts to give preclusive effect to state-judgments whenever the courts of the state from which the judgments emerged would do so." *Haring v. Prosise*, 462 U.S. 306 (1983); *McAdoo v. Dallas Corp.*, 932 F.2d 522 (CA6 1991).

In refusing to afford preclusive effect to the Kentucky Supreme Court's decision in the Chipman case, the Sixth Circuit grossly misapplied Kentucky law regarding claim preclusion. The Sixth Circuit relied on *Barnes v. McDowell*, 848 F.2d 725 (CA6 1998), for the proposition that "Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action where the causes of action in the two proceedings are not the same," even though *Barnes* is directly at odds with longstanding Kentucky precedent on this point. App. 14. Faced with a conflict between *Barnes* and Kentucky precedent, the Sixth Circuit elected to apply *Barnes* rather than certify the question concerning the application of Kentucky law to the Kentucky Supreme Court. Citing *Barnes*, the Sixth Circuit ruled that claim preclusion did not apply to Chipman's substantive due process claim because the state court wrongful death negligence claim "was not the same cause of action" as the substantive due process claim. App. 15. Proper application of Kentucky law would certainly have led to a different conclusion.

In determining if two causes of action are "the same" for purposes of claim preclusion analysis, Kentucky courts employ a transactional approach which looks beyond the

legal theories asserted to see if the two causes of action stem from the same underlying factual circumstances. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998); *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994); *Dennis v. Bullitt Fiscal Ct.*, 784 S.W.2d 608 (Ky. App. 1990); *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985). In that regard, under Kentucky law:

> The key inquiry in determining whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits contain the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

Yeoman, supra. The Sixth Circuit's superficial analysis of Kentucky law on claim preclusion completely ignored the transactional approach and, consequently, yielded an opinion which is strikingly contrary to Kentucky law and Sixth Circuit opinions interpreting Kentucky law on this important issue.

Kentucky law on this issue is discussed at length in *Harris v. Ashley*, 165 F.3d 27 (CA6 1998) (unpublished). In that case, Harris worked as a staff attorney for the Kentucky Department of Financial Institutions but was discharged for violating various departmental rules, falsifying time and attendance records, inadequate job performance, and failing to conduct herself in a professional manner. After she was discharged, Harris filed an action in state court under the Kentucky Whistleblower Act, in which she alleged that her employer ignored her reports about program mismanagement and retaliated against her for making those reports. The state court

dismissed Harris' claim for failure to prosecute and failure to provide discovery. Harris appealed the dismissal of her state court action to the Kentucky Court of Appeals. While her appeal was pending, Harris filed a second action in state court pursuant to 42 U.S.C. §1983, alleging that she was terminated in retaliation for exercising her First Amendment rights and seeking monetary and injunctive relief. The second action named the same defendants and was based on the same set of facts as the first action. The defendants removed the second action, which was premised on 42 U.S.C. §1983, to federal court. The federal district court then dismissed the second action on the grounds that it was barred by either *res judicata* or the *Rooker-Feldman* doctrine. The Sixth Circuit affirmed the district court's dismissal of the second action on the basis of claim preclusion. In so doing, the Sixth Circuit summarized pertinent Kentucky law as follows:

> Although *res judicata* requires an identity of claims, the doctrine will apply not only to issues which were actually raised and litigated, but also to any issues which might reasonably have been litigated. . . . In other words, *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time . . .

Id. at 3 (citations omitted).

The *Harris* Court reasoned as follows:

> Applying Kentucky law to the case at hand, it is obvious that Harris's prior whistleblower suit involved the same transaction as her current § 1983 suit: namely, her vocal criticism of the

> Kentucky Department of Financial Institutions and her supervisor's decision to discharge her, allegedly in retaliation for that criticism. Harris's right to speak out without being subjected to retaliation was the core issue of the prior action, just as surely as it is the core issue of this subsequent action. Harris cannot claim that her First Amendment right to free speech was 'not germane to, implied in or essentially connected with the actual issues' of her prior whistleblower suit, because both suits concern the same allegedly wrongful act. *It is true that Harris now plies her claim under a different legal theory that implicates federal constitutional rights, but it is a claim she could have and should have brought in her prior suit . . .*

Id. at 4 (emphasis added) (citations omitted).

As the *Harris* Court also noted, Kentucky courts follow the Restatement (Second) of Judgments §24, which provides as follows:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendants with respect to all or any parts of the transaction, or series or connected transactions, out of which the action arose.

Id. at 3, quoting Restatement (Second) of Judgments §24.

Under the transactional approach, a Kentucky court determines whether there is an identity of causes of action by looking first to the dimension or scope of the claim in the first cause of action. *Id.* at 3. State courts in Kentucky follow the Restatement (Second) of Judgments §24 and discuss this aspect of *res judicata* in terms of the rule against splitting claims. *Id. See Watts*, *supra* (describing

the rule against splitting causes of action as a "subsidiary" of the doctrine of *res judicata*); *Kirchner v. Riherd*, 702 S.W.2d 33 (Ky. 1985) (applying the rule against splitting claims in the context of *res judicata*); *Dennis*, *supra*; *Egbert*, *supra*. In assessing the dimension or scope of the claim asserted in the first cause of action, a Kentucky court examines the second action and determines if it involves issues which should have been litigated in the first. *Id.*

For example, in *Dennis*, a police officer brought a §1983 claim in federal court alleging his discharge from the police department violated his federal constitutional rights. After his §1983 claim was dismissed on the basis of the statute of limitations, Dennis brought another action in state court alleging that his discharge constituted a breach of contract, a violation of personnel policies, and a violation of the state constitution. Applying Kentucky law, the state appellate court held that Dennis' federal and state actions were the same for *res judicata* purposes. The Court explained:

> The issue in the instant action therefore is whether appellant's federal and state actions are the same for *res judicata* purposes. The Restatement (Second) of Judgments §24, comment a, speaks to this issue as follows: 'The present trend is to see claim in factual terms and to make it conterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.'

> Moreover, the rule against splitting causes of action recognized in the Restatement (Second) of Judgments §24 applies 'even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action.' Restatement (Second) of Judgments §25.

Dennis, supra at 610.

Recently, the Kentucky Supreme Court reaffirmed the application of claim preclusion and the subsidiary doctrine against splitting causes of action:

> The doctrine of *res judicata* (also known as a doctrine of finality of judgments) is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end. Thus, where there is an identity of parties and an identity of causes of action, the doctrine precludes further litigation of issues that were decided on the merits in the final judgment . . . Although the doctrine does not act as a bar in a subsequent proceeding if the issues or questions of law are different, a corollary of the doctrine is that a party may not split a cause of action. As a result, a final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment, but also of matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time.

Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002).

As set forth above, Kentucky law required the Sixth Circuit to give preclusive effect to the Kentucky Supreme Court's judgment with respect to Chipman's claim. Without question, Chipman's state and federal lawsuits both

arose from the same transactional nucleus of facts and therefore concern the same controversy. As a result, Chipman's state law action, now final by virtue of the Kentucky Supreme Court's judgment, is deemed under Kentucky law to have adjudicated every matter which was or could have been brought under the same set of facts. One need only look at the allegations in the Complaints filed in Chipman's federal and state actions – which are set forth identical to each other – to ascertain that the two actions arise from the same set of facts.

Contrary to the Sixth Circuit's ruling, the causes of action in the federal and state lawsuits are "the same" as defined by Kentucky law. All of Chipman's claims arise from the allegation that the defendant officers "forced by threats and assisted Connie Black, against her will, to become a passenger in Steve Kritis' truck" which Kritis later crashed, killing Black.

Since Kentucky courts have concurrent jurisdiction over Chipman's §1983 claims, Chipman could have brought those claims in the state court action but chose not to. Like the plaintiff in *Dennis*, *supra*, Chipman brought two successive suits seeking legal redress for the same allegedly wrongful act. Here, as in *Dennis*, the only difference between the two suits was that one sought relief under federal law while the other sought relief under state law. This type of splitting causes of action is not allowed under Kentucky jurisprudence, and the Sixth Circuit committed grievous error in its misapplication of Kentucky law.

The Sixth Circuit also seriously misapplied Kentucky law in determining that Stemler's federal case was not precluded by the Kentucky Court of Appeals' decision, which Stemler did not further appeal. The district court

refused to grant summary judgment to Officer Wince, holding that claim preclusion did not apply to Stemler's fabrication of evidence and excessive force claims. The Sixth Circuit upheld the district court's decision with little explanation, stating only that the fabrication of evidence and excessive force claims were not "identical causes of action to those brought in federal court." App. 22a. Again, the Sixth Circuit misapplied Kentucky law on claim preclusion, and particularly that portion of the law which defines the identity of claims and causes of action.

There is no dispute that Stemler's fabrication of evidence and excessive force claim arise from the same nucleus of facts as Stemler's state law claims for malicious prosecution, false arrest, false imprisonment, abuse of process, assault and battery, and intentional or negligent infliction of emotional distress. Stemler filed Complaints in both forums alleging the same facts. Specifically, both lawsuits are based on Officer Wince's arrest of Stemler on February 19, 1994.

In its most recent opinion, the Sixth Circuit held that Stemler's equal protection claim was barred by the doctrine of issue preclusion since the state court had determined in dismissing Stemler's malicious prosecution claim that the officers had no improper motive in initiating charges against her. App. 18a. Yet, after properly applying Kentucky law on claim and issue preclusion to these claims, the Sixth Circuit failed to properly apply claim preclusion to the fabrication of evidence and excessive force claims.

The source of the Sixth Circuit's error was its failure to apply Kentucky's well-established definition of "the same cause of action." According to the Kentucky decisions and the Restatement previously cited herein, Stemler

could have brought her fabrication of evidence and excessive force claims in the state court action. Had the Sixth Circuit properly applied the test set forth in case after case of Kentucky precedent, it would have found that Stemler's claims were barred by claim preclusion and the improper splitting of her causes of action. It is beyond argument that, under Kentucky law and its transactional approach to determine whether there is a sufficient identity of causes of action to apply claim preclusion, Stemler's claims in both federal and state court stem from the same underlying factual circumstances. *Dennis*, *supra*. Of course, "the key inquiry in determining whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts." *Yeoman*, *supra*. Therefore, Stemler, like Chipman, was required to bring all of her claims in the previously filed and now finally adjudicated state court action:

> When the Plaintiff brings an action on the claim in the court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and a judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.

Heylinger v. State Univ. and Comm. College Sys. Of Tenn., 126 F.3d 849 (CA6 1997).

The Sixth Circuit's gross misapplication of Kentucky law is an affront to the important public policies served by the doctrine of *res judicata* and the corollary rule against splitting causes of action. As the U.S. Supreme Court noted in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931), "Public policy dictates that there be an end of litigation; that those who have contested an issue

shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *See also Creamtop Creamery v. Dean Milk Co.*, 383 F.2d 358 (CA6 1967). "The basic premise is that a plaintiff must recover all damages arising from given operative facts in a single action." *Id.* at 363.

Clearly, the Sixth Circuit erred when it refused to recognize that Chipman's federal claims were barred under the doctrine of *res judicata*. Considering the magnitude of prejudice that has resulted from the Sixth Circuit's decision, Petitioners respectfully request that the Supreme Court grant certiorari to review the Sixth Circuit's decision.

CONCLUSION

Since the decision of this Court in *Feldman*, *supra*, in which the "inextricably intertwined" formula was set out, the *Rooker-Feldman* doctrine has been a source of confusion and uncertainty for the lower federal courts and the parties that practice in those courts. This case presents an opportunity for this Court to provide much-needed guidance on the proper purpose, scope and application of the *Rooker-Feldman* doctrine.

In addition, the Sixth Circuit's decision sets binding precedent which disregards all of the interests and purposes served by the *Rooker-Feldman* and *res judicata*, such as the protection of parties from the expense and vexation of multiple lawsuits in multiple forums, the conservation of judicial resources, the prevention of inconsistent verdicts, and comity. If allowed to stand, the decision will serve as an open invitation for litigants to split their causes of action between state and federal courts in an effort to maximize their potential recoveries at the expense of the judiciary and adverse parties, and in

derogation of clear public policy set by Kentucky courts which requires litigants to recover all damages arising from one set of facts in a single action.

To clarify *Rooker-Feldman* and to prevent the Sixth Circuit's erroneous decision from serving as precedent, Petitioners respectfully pray that this Court grant its Petition for Writ of Certiorari.

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350 F.3d 578

United States Court of Appeals,
Sixth Circuit,
Susan STEMLER, Plaintiff-Appellee, William Chipman,
Administrator of the Estate of Conni Black,
Plaintiff-Appellant/Cross-Appellee, Randy Black,
Legal Guardian of Shianne Black,
Intervenor-Appellant/Cross-Appellee,
v.
FLORENCE, City of Florence, Defendant-Appellee,
Bobby Joe Wince, in his official capacity as an Officer of
the Florence Police Department; John Dolan, in his official
capacity as an Officer of the Florence Police Department;
Thomas Dusing, in his official capacity as an Officer of the
Florence Police Department, Defendants-Appellees/
Cross-Appellants, Ron Kenner, in his official capacity
as Boone County Sheriff, Defendant.
Susan Stemler, Plaintiff-Appellee, Randy Black,
Intervenor-Appellee/Cross-Appellant
v.
Florence, City of Florence, Defendant, Bobby Joe Wince,
in his official capacity as an Officer of the Florence Police
Department; John Dolan, in his official capacity as an
Officer of the Florence Police Department;
Thomas Dusing, in his official capacity as an
Officer of the Florence Police Department,
Defendants-Appellants/Cross-Appellees.
Nos. 01-5956, 01-6205.
argued Dec. 5, 2002.
Decided and Filed Dec. 2, 2003.
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David Whalin (briefed), Landrum & Shouse, Louisville, KY, for Defendants.

Before: BOGGS, Chief Judge; and SILER and GIBBONS, Circuit Judges.

OPINION

BOGGS, Chief Judge.

Appellant/cross-appellee William Chipman, administrator of the estate of Conni Black, and intervenor-appellant/cross-appellee Randy Black appeal the district court's order granting summary judgment for the defendants in this civil action arising out of an encounter between Conni Black and Susan Stemler, on the one hand, and police officers from the City of Florence, Kentucky and Boone County, Kentucky. Appellees/cross-appellants Bobby Joe Wince, John Dolan, and Thomas Dusing appeal the denial of summary judgment on Susan Stemler's claim of violation of equal protection. Wince appeals the denial of summary judgment on Stemler's claims of fabrication of evidence and excessive force.

This case arises out of an incident that occurred on February 19, 1994. We have reviewed this case on a previous appeal. The relevant facts are described at length in *Stemler v. Florence,* 126 F.3d 856 (1997). Briefly, Black was killed in a car accident shortly after police officers allegedly removed her from Stemler's car and placed her in the truck of her boyfriend, Steve Kritis. Both Black and Kritis had been drinking heavily, and after an altercation between them at a bar, Black left with Stemler in Stemler's car. Kritis then began to chase the women on the streets of Florence before both the car and the truck were

stopped by the police after a concerned citizen alerted them to the situation. Stemler was arrested for driving under the influence. Witnesses say that all the police officers present repeated Kritis's assertion that Stemler was a lesbian to each other and to others present. No police officer ever checked Kritis for intoxication or asked him to leave his truck. Black was either escorted or carried from Stemler's car to the passenger seat of Kritis's truck. Kritis then drove away and turned onto the northbound lanes of I-75. According to Kritis, Black, who had passed out, woke up and began to hit Kritis. He began to hit back and lost control of the truck. The truck swerved and collided with the guardrail. Black was partially ejected from the passenger-side window. Her arm was completely severed from her body and her head was split into two parts by some part of the guardrail.

I. The Claims

A. Chipman's claim

On March 7, 1994, William Chipman, the administrator of the estate of Conni Black, filed a wrongful death action in the Boone County Circuit Court against Florence police officers Dusing, Dolan, and Wince; Boone County police officers Rob Reuthe and Chris Alsip; the City of Florence; and Ron Kenner, the Boone County Sheriff. The Boone County Circuit Court entered summary judgment on behalf of the defendants on Chipman's wrongful death claim. *Chipman v. City of Florence,* No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996). The Kentucky Court of Appeals reversed the Circuit Court. *Chipman v. City of Florence,* No.1996-CA-001287-MR (Ky.Ct.App. Nov. 25, 1998). The Kentucky Supreme Court then reversed the Court of Appeals and reinstated the

summary judgment ordered by the Boone County Circuit Court. *City of Florence v. Chipman,* 38 S.W.3d 387 (Ky.2001).

Chipman also filed a complaint in federal court against the same defendants on March 31, 1994.[1] The complaint alleged that the defendants were liable under 42 U.S.C. § 1983 for Black's wrongful death because they had displayed deliberate indifference by forcing her into Kritis's car.[2]

Chipman's federal claims were dismissed by the district court in 1994. The district court granted the individual officers' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim, on the ground of qualified immunity. The district court also granted the motions for summary judgment of Florence and Boone County. *Chipman v. City of Florence,* 858 F.Supp. 87 (E.D.Ky.1994), *reconsideration denied on amended complaint,* 866 F.Supp. 332 (E.D.Ky.1994).

On appeal, we upheld the district court's order granting summary judgment to the municipal defendants, Florence and Boone County. *Stemler,* 126 F.3d at 866. However, we reversed the district court's dismissal of Chipman's claims against the individual officers. We held that Chipman had pled facts sufficient to maintain her substantive due process claim against the individual officers. *Id.* at 870. The only state court decision prior to

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[1] We treated the complaint against Kenner as a suit directly against Boone County. *Stemler,* 126 F.3d at 864 n. 8.

[2] This claim will be referred to as "the substantive due process claim."

our decision was the Boone County Circuit Court decision awarding judgment to the defendant officers, holding that Black was not in custody when the pickup struck the guardrail and that none of the state actors were the direct cause of her death on the highway. We stated in *Stemler* that "[w]hile these findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim." *Id.* at 870 n. 12. The case was remanded to the district court for further proceedings consistent with the opinion.

Shortly after the opinion issued, Randy Black was granted permission to intervene on behalf of Conni Black's minor child, Shianne Black, to bring a claim of loss of parental consortium. At about the same time, the federal district court held the case in abeyance pending a decision by the Kentucky Supreme Court on appeal of the Boone County Circuit court's order entering summary judgment in favor of defendants and the Kentucky Court of Appeals reversal of that order, which was issued February 22, 2001. Chipman later reached a settlement with the Boone County officers. In June 2001, the district court granted the officers' motion for summary judgment on Chipman's substantive due process claim, and Shianne Black's claim for loss of parental consortium. The district court found that the decision of the Kentucky Supreme Court barred their claims under the doctrine of issue preclusion. The issue that the district court found could not be relitigated was whether Black was in "custody" when she got into Kritis's car because, according to the district court, the Kentucky Supreme Court had held that Black was never in custody.

B. Stemler's Claims

Susan Stemler filed a federal complaint, pursuant to 42 U.S.C. § 1983, against officers Wince, Dolan, Dusing, and the City of Florence. The complaint alleged claims of excessive force, wrongful arrest, malicious prosecution, and violation of equal protection on the bases of sex and sexual orientation. The district court granted the officers' Rule 12(b)(6) motions to dismiss on the ground of qualified immunity. The district court then consolidated her case with Chipman's and awarded summary judgment to Florence. The federal district court then entered an order granting Stemler's motion for voluntary dismissal of her excessive force claim against Wince. This voluntary dismissal was entered pursuant to an agreement between the parties to dismiss the claim so that an appeal could proceed in this court. The agreement allowed her to bring her claim again should she be successful upon appeal.

As Chipman did, Stemler had also brought similar claims in Kentucky state court. She raised state-law claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment, and negligent or intentional infliction of emotional distress. *Stemler v. Florence,* No. 94-CI-00459. The Boone County Circuit Court held that she was precluded from prosecuting all of her claims, except for assault and battery. *See Stemler v. City of Florence,* 126 F.3d 856, 871 (6th Cir.1997). There was ample evidence constituting probable cause for her arrest. This barred her false arrest and malicious prosecution claim. As the defendants were police officers, the court found that there was no distinction between her claims of false arrest and false imprisonment. It also found that her abuse of process claim was barred based on the probable cause finding, that the officers had

no improper motive in arresting her, and that a state prosecutor independently had made the prosecutorial decisions in her criminal case. As for her claims of negligent or intentional infliction of emotional distress, the court found that under Kentucky law, there is no viable cause of action for these torts when she had raised essentially identical claims under traditional torts as discussed above. Finally, the court determined that there was a genuine issue of material fact with respect to her assault and battery claim against Wince, but not against Dusing and Dolan. Stemler later voluntarily dismissed this claim. The Kentucky Court of Appeals affirmed the grant of summary judgment. Stemler did not pursue an appeal.

Upon appeal of the district court decision to this court, we affirmed the grant of summary judgment in favor of the City of Florence. *Stemler,* 126 F.3d at 866. We also affirmed the dismissal of her false arrest and malicious prosecution claims because the Boone County Circuit Court's finding that there had been probable cause to arrest and prosecute Stemler precluded relitigating that issue in this court. *Id.* at 871-72. We noted that although Stemler seemed to be asserting a claim that Wince had falsified evidence against her, and that the state court's finding of probable cause would not preclude her from prosecuting this claim, she had failed to properly plead it. *Id.* at 872. We stated that she would be free to file a new complaint against Wince raising that claim. *Ibid.* Finally, we reversed the dismissal of Stemler's equal protection claim of selective prosecution against the officers, holding that the allegations in her complaint were sufficient to state a claim. *Id.* at 874.

After our opinion in *Stemler* was issued, Stemler amended her complaint to allege that Wince fabricated the

blood sample evidence used in her DUI trials.[3] As it did in Chipman's case, the district court held Stemler's case in abeyance pending final judgments in the state court proceedings. In June 2001, the district court denied the officers' motion for summary judgment on Stemler's claims of denial of equal protection based on selective prosecution, and Wince's motion for summary judgment on her claims of falsification of evidence, and excessive force. The district court noted that none of these claims actually had been litigated in state court. It stated that while it might agree with the defendants that Stemler could and should have brought these claims in state court, our opinion in *Stemler* had implied that claim preclusion did not apply. The court further stated that our holding in *Stemler* stated that she could proceed with these claims, and that the "law of the case" would be violated if it did not permit her to do so.

II. Chipman's substantive due process claim

Chipman argues that our resolution of the custody issue in his favor in *Stemler* should have had preclusive effect on the Kentucky state courts. He argues that our opinion's holdings constituted the "law of the case" and the district court erred in applying the doctrine of issue preclusion based on the state court proceedings. The officers argue that the district court was correct in deciding that issue preclusion barred the relitigation of the issue of custody. Alternatively, they argue that Chipman's

[3] Stemler was twice tried in Boone County District Court on the DUI charge. The first trial ended in a hung jury. She was acquitted at the end of her second trial.

substantive due process claim is barred from further litigation under the *Rooker-Feldman* doctrine, or under the doctrine of claim preclusion.

We review *de novo* a district court's decision with regard to issue preclusion or claim preclusion. *Heyliger v. State Univ. and Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 851 (6th Cir.1997); *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir.1995), *cert. denied*, 116 S.Ct. 1848 (1996). When deciding whether to afford preclusive effect to a state court judgment, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires the federal court to give the prior adjudication the same preclusive effect it would have under the law of the state whose court issued the judgment. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Heyliger*, 126 F.3d at 851-52.

Under Kentucky law, "[c]laim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." *Yeoman v. Kentucky Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky.1998). "Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action." *Ibid.*

A. Issue Preclusion

In order for issue preclusion to apply in Kentucky, (1) the issue in the second case must be the same as the issue in the first case, (2) the issue must have been actually litigated, (3) the issue must have been actually decided, and (4) the decision on the issue in the prior action must have been necessary to the court's judgment. *Ibid.* The district court found that all four factors were met when the Kentucky Supreme Court resolved Chipman's state claims.

In order for Chipman to prevail in the Kentucky state courts, the Kentucky Supreme Court stated that he had to show "the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers. . . ." *Chipman,* 38 S.W.3d at 392. The court went on, stating that "[i]n order for the special relationship to exist, two conditions are required: 1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor." *Ibid.* The court held that "[t]here is no evidence from which it can be ascertained that Black was in state custody or otherwise restrained by the police at the time the pickup truck struck the guardrail with the fatal result. In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers." *Ibid.*

The Kentucky Supreme Court also stated that Black was *never* in custody. *Id.* at 393. This is precisely the issue that is relevant in a § 1983 action. In order to prevail on the § 1983 claim, Chipman needs to show that the defendant officers "violated substantive due process by placing [Black] at risk of harm from a third party. . . . " *Stemler,* 126 F.3d at 867. The court must first determine whether "the plaintiff and the state actors had a sufficiently direct relationship such that the defendants owed [Black] a duty not to subject her to danger," and then "the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory." *Ibid.* As to the first part, the relevant inquiry is whether Black was

in custody at the time the officers allegedly forced her into Kritis's truck.

First, the Kentucky Supreme Court stated that there was no evidence in the record to support a finding that Black was ever in custody, the same issue that is necessary to Chipman's federal claim. Second, the custody issue was actually litigated in the state courts: in the Boone County Circuit Court, the Kentucky Court of Appeals and the Kentucky Supreme Court. The Kentucky Supreme Court found that there was no evidence to support a finding that Black was ever in custody in the context of deciding the appeal of a summary judgment motion. A summary judgment order is a decision on the merits. *Ohio Nat'l Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir.1990). Third, the issue was actually decided by the Kentucky Supreme Court. The court made an explicit statement that there was insufficient evidence to support a finding that Black was in custody.

However, the Kentucky Supreme Court's statement that she was never in custody was not necessary to its judgment. The Boone County Circuit Court held that there was no genuine issue of material fact regarding whether Black was in custody at the time the pickup struck the guardrail – the point at which the injury-producing act occurred. Specifically, it stated she was not in custody at this point. This was the only holding necessary for the affirmance of the Boone County Circuit Court's judgment. As we noted in discussing this lower court decision in *Stemler,* the holdings of the state court on this issue are entitled to preclusive effect. Nonetheless, this precise issue is irrelevant to the substantive due process claim.

As the Kentucky Court of Appeals (now the Kentucky Supreme Court) stated in *Sedley v. City of West Buechel,* 461 S.W.2d 556, 558 (Ky.1971):

> The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is *not conclusive as to matters* which were immaterial or *unessential to the determination* of the prior action or which were not necessary to uphold the judgment.

(Emphasis added).

As the Kentucky Supreme Court correctly stated, our statements in *Stemler* regarding whether Black was in custody were dicta, as the only issue before us at that point was the sufficiency of the allegations in the complaint. Similarly, the statements of the Kentucky Supreme Court regarding whether Black was *ever* in custody are dicta, as they are not necessary to the state courts' disposition of the case. The actual holding of the Kentucky Supreme Court reads:

> In order for a claim to be actionable in negligence, there must be the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers to Black to protect her from crime or accident. In order for the special relationship to exist, two conditions are required: 1) the victim must have been in state custody or otherwise restrained by the state *at the time the injury producing act occurred,* and 2) the violence or other offensive conduct must have been committed by a state actor. Neither of these factors can be found from the undisputed material facts in this case. There is no evidence from which it can be ascertained

> that Black was in state custody or otherwise restrained by the police *at the time the pickup truck struck the guardrail with the fatal result.* In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers.

City of Florence v. Chipman, 38 S.W.3d 387, 392 (Ky.2001) (emphasis added and citations omitted).

The Kentucky Supreme Court would have reached the same result if it had found that Black was in custody at the time she entered Kritis's truck, so long as it found she was not in custody at the time the truck hit the guardrail.

The district court erred in finding that issue preclusion barred Chipman's substantive due process claim.

B. Claim Preclusion

The defendant officers also argue that claim preclusion should bar Chipman's claim against them. Claim preclusion bars further litigation under Kentucky law when: (1) there is identity of the parties; (2) there is identity of the causes of action; and (3) the action has been resolved on the merits. *Yeoman,* 983 S.W.2d at 465. *Yeoman* also stated that "[f]or claim preclusion to apply, the subject matter of the subsequent suit must be identical." *Ibid.*

In *Barnes v. McDowell,* 848 F.2d 725 (6th Cir.1988), we stated that "Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action when the causes of

action in the two proceedings are not the same." *Id.* at 730. A district court, interpreting Kentucky law, stated:

> [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, *the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.*

Presbyterian Child Welfare Agency of Buckhorn v. Nelson County Bd. of Adjustment, 185 F.Supp.2d 716, 720 (W.D.Ky.2001) (quoting *Louisville v. Louisville Professional Firefighters Ass'n,* 813 S.W.2d 804, 807 (Ky.1991)).

While there is identity of the parties, and the action was resolved on the merits, Chipman's claim is not barred, as it is not the same claim as in state court. His claim in the state courts was for wrongful death, which is a negligence claim. This is not the same cause of action as the one he brought in the federal court, a claim of violation of Black's substantive due process rights. It is indeed true that this claim could have been brought in state courts. However, under the Kentucky law of claim preclusion, this does not matter, as there is no identity of the causes of action. *Yeoman,* 983 S.W.2d at 465. Chipman's federal claim is not barred by claim preclusion.

C. *Rooker-Feldman*

The defendant officers also argue that the federal district court lacked jurisdiction to consider Chipman's claim under the *Rooker-Feldman* doctrine. They argue that Chipman's federal suit is an attempt to appeal a state court decision to the federal courts.

The doctrine gets its name from two Supreme Court cases. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), held that the power to hear appeals from state court judgments is exclusively held by the United States Supreme Court. The Supreme Court held in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), that federal district courts do not have jurisdiction to hear challenges to certain state-court decisions. The *Rooker-Feldman* doctrine states that "lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. Berkley,* 305 F.3d 386, 390 (6th Cir.2002). In defining "inextricably intertwined," we have adopted the reasoning that:

> [t]he federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Id. at 391 (quoting *Catz v. Chalker,* 142 F.3d 279, 293 (6th Cir.1998)). In *Peterson Novelties,* we held that the *Rooker-Feldman* doctrine was inapplicable to claims that the state

court did not address or rule upon even though the federal claims arose out of the same nucleus of facts. *Id.* at 391-93. Therefore, the question is whether this court could hold that the officers violated Black's constitutional rights without implicitly holding that the state court wrongly decided the issues before it. *Id.* at 393.

This court discussed the *Rooker-Feldman* doctrine and its frequent conflation with claim and issue preclusion in *Hutcherson v. Lauderdale County,* 326 F.3d 747 (6th Cir.2003). This court stated that Seventh Circuit case law provided a useful way to determine which doctrine to apply:

> In order to determine the applicability of the *Rooker-Feldman* doctrine, the fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment. If the injury alleged resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction. If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not "inextricably intertwined" with the state judgment, . . . res judicata may apply, but Rooker-Feldman does not. . . .

Id. at 755 (quoting *Garry v. Geils,* 82 F.3d 1362, 1365-66 (7th Cir.1996)).

As Chipman is not directly challenging the state court's judgments in federal court, the doctrines of claim and issue preclusion are more properly applied to this case. However, in any case, the *Rooker-Feldman* doctrine does not apply. The Kentucky Supreme Court's discussion

of whether Black was ever in custody was dicta, and therefore any finding by the federal court that Black was in custody at some point during the encounter would not implicitly hold that the state court improperly decided *the issues before it.* The issue of Black's custody before the truck hit the guardrail was not an issue that was salient before the Kentucky court.

The district court does have jurisdiction to hear Chipman's substantive due process claim.

III. Stemler's Claims

A. Equal Protection Claim

The defendants argue that Stemler's equal protection claim is barred by claim preclusion, issue preclusion, and the *Rooker-Feldman* doctrine. The district court, although inclined to rule that her claim was barred by claim preclusion, instead decided that this court's decision in *Stemler* precluded the application of any of those doctrines. We first note that the district court was not required to abstain from analyzing Stemler's claims under the claim preclusion doctrine because of our previous opinion. Our opinion was issued while Stemler's appeal was pending with the Kentucky Court of Appeals. We stated that *at that point,* claim preclusion did not yet apply to her claims before the federal courts. We nowhere said that claim preclusion would never apply.

The defendant officers argue that the Kentucky Court of Appeals decision conclusively decided the question of whether they had acted with improper motive in arresting her. The Court of Appeals stated that "[a]lthough the officers may have been crude during Stemler's arrest, we

agree with the circuit court that Stemler cannot establish that they acted with an improper motive." *Stemler v. City of Florence,* No.1996-CA-001318-MR at 23. The court made this statement in the context of discussing the propriety of summary judgment regarding Stemler's abuse of process claim. One of the essential elements of that tort is an ulterior purpose. *Bonnie Braes Farms, Inc. v. Robinson,* 598 S.W.2d 765, 766 (Ky.Ct.App.1980). It was one of several findings of fact that supported the granting of summary judgment in favor of the defendants.

Stemler argues that our statement in our opinion in *Stemler* that "the record evidence supports a finding" that the officers chose to arrest her because they believed her to be a lesbian should have had preclusive effect on the Kentucky state courts. However, this statement was dicta. We reversed the district court's dismissal of her claim on a 12(b)(6) motion. Thus the only question before our court was whether her complaint adequately stated an equal protection claim. A dismissal pursuant to 12(b)(6) "is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief." *Kostrzewa v. City of Troy,* 247 F.3d 633, 638 (6th Cir.2001). That judgment does not preclude a later summary judgment motion, arguing that the plaintiff *in fact* could not show such evidence. In state court, the claim was being considered for summary judgment purposes. A summary judgment order is a decision on the merits. *Ohio Nat'l Life Ins. Co.,* 922 F.2d at 325. Thus the issue was actually litigated in the state courts. And, as the state court made an explicit finding that the officers had no improper motive, the issue was actually decided.

In order to maintain a claim of selective prosecution (the basis of Stemler's equal protection claim), the plaintiff

must prove that a state actor initiated the prosecution with a discriminatory purpose. This is the same issue as the ulterior purpose issue in Stemler's state claim of abuse of process. And finally, the issue was necessary to the resolution of the state claim. Thus, the state court's finding that the officers did not have an improper motive in arresting Stemler has preclusive effect on relitigating that issue in the federal courts.

Because Stemler's equal protection claim is barred by issue preclusion, the district court should have granted summary judgment to the officers on that claim.

B. Excessive Force

Stemler's federal claim of excessive force and her state claim of assault and battery against Wince were voluntarily dismissed so that she could appeal unfavorable lower court decisions on other claims. Wince first argues that Stemler has never taken any action to revive her federal claim. However, Stemler's Second Amended Complaint was accepted by the district court on January 13, 1998. Her Second Amended Complaint incorporated by reference her initial complaint and her First Amended complaint, which included the excessive force claim. Furthermore, Wince does not explain why he did not make this argument when he moved the district court for summary judgment on this claim, and why the district court denied his summary judgment motion without ever addressing this issue.

Wince next argues that the voluntary dismissal agreement bars Stemler from reviving her excessive force claim because it bars her from reviving her assault and battery claim. The agreement stated that if her appeal to

the state appellate court on her other state claims was unsuccessful, then her assault and battery claim could not be revived, and vice versa. It similarly stated that if her appeal to the federal appellate court was unsuccessful, then her excessive force claim could not be revived, and vice versa. He argues that because both claims rely on the same facts and elements of proof, the dismissal of her state law claims bars her from reviving her assault and battery claims.

First, a voluntary dismissal of a claim is not a judgment on the merits. Ky. R. Civ. P. 41.01. While Stemler's assault and battery claim was dismissed with prejudice against Dolan and Dusing, the state court did not grant summary judgment to Wince, and issue preclusion does not apply to her claim against Wince. Second, the agreement itself does not bar her from bringing her federal claim. As she was not successful on appeal in the state courts, the agreement would seem to bar her from bringing her assault and battery claim again in state courts. However, the agreement addressed her federal and state claims separately. The agreement did not say that if she was unsuccessful in the state courts that she was barred from bringing her federal excessive force claim again. The agreement that bars her from bringing her state assault and battery claim is not a judgment for the purposes of issue preclusion, as Wince seems to argue.

Wince next argues that the *Rooker-Feldman* doctrine barred the district court from considering Stemler's claims since any decision favorable to her would have been an impermissible review of issues decided adversely to her in the Kentucky state court. He also argues that the claim preclusion doctrine bars her from relitigating this claim in the federal courts as well. We will discuss the application

of these doctrines below in conjunction with Stemler's other outstanding claim.

C. The application of claim preclusion and the *Rooker-Feldman* doctrines to Stemler's Fabrication of Evidence and Excessive Force Claims

Wince argues that Stemler's excessive force and fabrication of evidence claims should be barred by claim preclusion and the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine, as previously noted, states that "lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties,* 305 F.3d at 390. The question for this court is whether a federal court can rule in Stemler's favor on her federal claims without implicitly holding that the state courts wrongly decided the issues before them. *Id.* at 393.

The state courts adjudicated several of Stemler's claims. As noted above, Stemler's claims of malicious prosecution and false arrest and imprisonment were dismissed on summary judgment because the state court held that there was no genuine issue that probable cause existed for her DUI arrest. Her claims of intentional or negligent infliction of emotional distress and outrage were dismissed on summary judgment because Kentucky law holds that if a claimant raises claims under traditional torts that allow recovery for emotional distress, the claimant cannot raise claims of intentional or negligent infliction of emotional distress or outrage. The Boone County

Circuit Court found that there was a genuine issue of material fact as to her assault and battery claim against Wince.

Except for the decision refusing to dismiss her assault and battery claim against Wince, the Kentucky state courts never considered or ruled on any elements of the claims of fabrication of evidence or excessive force, nor did they address any facts or issues regarding these claims. The state courts confined themselves to the issues of probable cause and the motive for Stemler's arrest. The district court could rule in Stemler's favor without even implicitly holding that the Kentucky courts wrongly decided the issues before them. The *Rooker-Feldman* doctrine does not apply to these claims, and the district court has jurisdiction to hear them.

Wince also argues that claim preclusion would bar Stemler from bringing these claims in federal court, because as she could have brought them in state court. However, as discussed above, the Kentucky law of claim preclusion only bars bringing the *same* cause of action twice. Stemler's claims for falsification of evidence and excessive force could have been brought in state court and were not. However, under Kentucky law, as she did not bring identical causes of action in state court, she is not barred from bringing them in federal court. *Yeoman,* 983 S.W.2d at 465. The district court did not err when it decided that claim preclusion did not apply to these claims.

IV. Conclusion

In No. 01-5956, we REVERSE the grant of summary judgment to the defendants on Chipman's substantive due

process claim. In No. 01-6205, we REVERSE the denial of summary judgment with regard to Stemler's equal protection claim. We AFFIRM the denial of summary judgment with regard to Stemler's excessive force and falsification of evidence claim. Both cases are REMANDED to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5956/6205

No. 01-5956

SUSAN STEMLER,
Plaintiff-Appellee,
WILLIAM CHIPMAN, Administrator of
the Estate of Conni Black,
Plaintiff-Appellant/Cross-Appellee,
RANDY BLACK, Legal Guardian of
Shianne Black,
Intervenor-Appellant/Cross-Appellee,

v.

FLORENCE, City of Florence,
Defendant-Appellee,
BOBBY JOE WINCE, in his official capacity
as an Officer of the Florence Police Department;
JOHN DOLAN, in his official capacity as an
Officer of the Florence Police Department;
THOMAS DUSING, in his official capacity as an
Officer of the Florence Police Department
Defendants-Appellees/Cross-Appellants,
RON KENNER, in his official capacity as
Boone County Sheriff,
Defendant.

No. 01-6205

SUSAN STEMLER,
Plaintiff-Appellee,
RANDY BLACK,
Intervenor-Appellee/Cross-Appellant,

v.

FLORENCE, City of Florence,
Defendant,
BOBBY JOE WINCE, in his official capacity
as an Officer of the Florence Police Department;

JOHN DOLAN, in his official capacity as an Officer of the Florence Police Department;

THOMAS DUSING, in his official capacity as an Officer of the Florence Police Department,
Defendants-Appellants/Cross-Appellees.

Before: BOGGS, Chief Judge; and SILER and GIBBONS, Circuit Judges.

JUDGMENT

(Filed Dec. 2, 2003)

On Appeal from the United States District Court for the Eastern District of Kentucky at Covington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the grant of summary judgment to the defendants on William Chipman's substantive due process claim in Case No. 01-5956 is REVERSED, and the denial of summary judgment with regard to Susan Stemler's equal protection claim in Case No. 01-6205 is REVERSED. IT IS FURTHER ORDERED that the denial of summary judgment with regard to Susan Stemler's excessive force and falsification of evidence claim is AFFIRMED, and both cases are REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CONSOLIDATED CIVIL ACTION NO. 94-62 & 95-14

WILLIAM CHIPMAN, Administrator of the Estate of Conni Black, ET AL **PLAINTIFFS**

VS.

CITY OF FLORENCE, ET AL **DEFENDANTS**

ORDER

(Filed June 29, 2001)

On Friday, June 22, 2001, oral arguments were heard on the defendants' renewed joint motion for summary judgment. Eric Deters and Pat Moeves represented the plaintiffs. Hugh Skees, Jeffrey C. Mando, Mary Ann Stewart, and Dave Whalin represented the defendants. The proceedings were recorded by official court reporter Amy J. Blosser.

The parties being thoroughly familiar with the facts, and background, the court will not reiterate them here.

Black's Estate's Claim

With regard to plaintiff William Chipman's substantive due process claim for the death of his decedent Connie [sic] Black, after a thorough analysis, the court concludes that the claim is barred by the principles of collateral estoppel (issue preclusion) in that the facts giving rise to the federal and state claims are identical. The issue of whether or not Black was in "custody" (that

is, her physical liberty restrained and/or her decision-making ability restrained and/or controlled by the defendant officers) *when she got in Kritis'* car is essential to the state wrongful death claim and the federal substantive due process claim.

This issue was fully litigated in the state courts and decided against Black's estate by the Supreme Court of Kentucky. Therefore, it cannot be relitigated here, even in a federal claim. "When such actions proceed simultaneously, as here, the first judgment entered must be regarded as *res judicata* for issues in the remaining case." *Lesher v. Lavrich*, 784 F.2d 193, 194-95 (6th Cir. 1986); *see also Gutierrez v. Lynch*, 826 F.2d 1534, 1537 (6th Cir. 1987) (*citing Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 556 (6th Cir. 1983) (the effect of the full faith and credit statute is to impose on federal courts "the obligation to give state court judgments the same effect as they have in the state in which they were rendered").[1]

"The Supreme Court [of the United States] has noted that *res judicata* 'promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system. Accordingly, the law is well-settled that federal courts must give prior state

[1] The court notes that when this matter was before the Sixth Circuit Court of Appeals on a motion to dismiss, it found that Black was in custody citing to both the allegations in the complaint as well as record evidence. However, in the state court decision, the custody issue was decided on a motion for summary judgment where, unlike the Sixth Circuit, no deference was given to the allegations as stated in the complaint and only the record evidence was relied upon.

court judgments the same preclusive effect they would have in the courts of that state." *Id.* (citations omitted); *see also* the *res judicata* analysis concerning Stemler's claims of the majority in the Sixth Circuit opinion this case, 126 F.3d at 871.

Black's estate argues that it is the "law of the case" that the Kentucky Supreme Court's holding that Black was not in custody at the time she entered Kritis' car is not binding on this court. (*See note 12 of the Sixth Circuit opinion*). However, the estate overlooks that the only state court ruling the Sixth Circuit had before it was the opinion and order of the Boone Circuit Court, which at page 4 found only that Black was not in custody "at the time [Kritis'] pickup struck the guardrail." The Supreme Court of Kentucky went further and found that Black was never in custody, 38 S.W.2d at 391. Thus, the holding of the Supreme Court of Kentucky is the first holding to make a determination solely on the record evidence that Black was never in police custody. Hence, this is entitled to preclusive effect by this court.

Furthermore, *res judicata* impedes Randy Black's intervening complaint on behalf of Shianne Black for loss of parental consortium. Absent a duty founded on custody, there can be no claim for loss of parental consortium in this matter.

Stemler's Claims

Plaintiff Susan Stemler's claims are more difficult. She asserts the following claims: 1) denial of equal protection based on selective prosecution; 2) falsification of evidence; and 3) excessive force.

Defendants argue that under the principles of claim preclusion Stemler has improperly split her claims, all of which should have been brought in one court or the other, since the state court had jurisdiction of the federal claims and vice versa. It should be noted that these claims were not actually litigated in the state court.

The court might well agree with defendants that Stemler could and should have brought these claims in state court, but failed to do so, and therefore, she should be precluded from proceeding with them after a final judgment has been rendered on her state court claims.[2] *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) (a state court judgment has the same claim preclusive effect in a federal § 1983 suit as it would be accorded in the state courts of the rendering state); RESTATEMENT (SECOND) OF JUDGMENTS §86 cmt. f (a plaintiff is ordinarily obligated to assert both of the federal and state claims in one action).

However, after a careful review of the Sixth Circuit opinion, this court has concluded that it was necessarily implied in that opinion that claim preclusion did not apply. Otherwise, the majority would not have addressed the principles of issue preclusion and held that they did not bar Stemler's claims listed above. The Sixth Circuit majority's holding[3] was that she cold proceed with these

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[2] One could hardly imagine a better illustration of the evils of claim splitting than the case at bar, which has become a procedural labyrinth due to the splitting of the federal and state claims.

[3] This court is of the view that the concurring opinion does not constitute the "law of the case" as claimed by defendants herein,

(Continued on following page)

claims, and this court is of the view that the doctrine known as "the law of the case" would be violated if it did not permit her to do so. "Under the 'mandate rule,' the district court must act, on remand, in accordance with the decision of a superior court:

> [T]he mandate rule . . . requires lower courts to adhere to the commands of a superior court. . . . Accordingly, [u]pon remand of the case for further proceedings after a decision by the appellate court, the trial court must 'proceed in accordance with the mandate and the law of the case as established on appeal.' The trial court must implement both the letter *and the spirit* of the mandate, taking into account the appellate court's opinion and the circumstances it embraces."

Allard Enterprises v. Advanced Programming Resources, 249 F.3d 564, 569-70 (6th Cir. 2001) (internal marks and citations omitted) (emphasis added).

This court finds that the "spirit of the mandate" directs it to allow Stemler to proceed with her claims.

Therefore, having heard counsel and the court being advised,

IT IS ORDERED as follows:

1) That defendants' summary judgment motion (**doc. #286 in #94-62 and Doc. #114 in #95-14**) be, and it is, hereby **granted in part** as to Chipman's claim for

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inasmuch as it was not necessary to make up a majority, two judges having concurred in the leading opinion.

substantive due process and the loss of parental consortium claim of the intervenor plaintiff, Randy Black. Both of these claims are hereby **dismissed with prejudice**.

2) That defendants' motion for summary judgment (**doc. # 286 in #94-62 and doc. #114 in #95-14**) be and is hereby by [sic] **denied in part** as to Stemler's claims.

3) That a jury trial on Stemler's claims will remain as previously set for **August 13, 2001 at 10:00 A.M.**

4) That a final pretrial conference will be held in this matter on **August 1, 2001 at 1:00 P.M.** A separate Final Pretrial Conference Order is filed concurrently herewith. Time limits for trial will be set at the final pretrial conference after conferring with counsel.

This 29th day of June, 2001.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 95-14

SUSAN STEMLER **PLAINTIFF**

VS.

CITY OF FLORENCE, ET AL **DEFENDANTS**

ORDER

(Filed Aug. 15, 2001)

On Wednesday, August 1, 2001, oral arguments were heard on all pending motions. Eric Deters represented the plaintiff. Hugh Skees, Jeffrey C. Mando, and Dave Whalin represented the defendants. The proceedings were recorded by court reporter LaCartha Pate. Having taken the matter under submission, and the court being duly advised,

IT IS ORDERED as follows:

Defendant Wince's motion for summary judgment on the claims of fabrication of evidence and excessive force based on the defense of qualified immunity (doc. #129-1) be, and it is hereby denied, the court having found that genuine issues of material fact exist on these claims, and that the claims are based on clearly established law.

On the fabrication of evidence claim, the court finds that if plaintiff's allegations are true, plaintiff's right to procedural and substantive due process were violated and that these rights were clearly established. The court further finds there is adequate evidence in the record to raise a genuine issue of material fact regarding these

claims. This evidence includes, but is not necessarily limited to, the fact that defendant Wince's handling of plaintiff's blood sample was highly unusual in failing to send it to the Kentucky State Police Laboratory for five days during which time no one can confirm the integrity of the sample. Further, a chain of custody cannot be established for the blood sample during this time. Also, plaintiff has an expert witness, Dr. Nelson, whose opinion is that if plaintiff's blood alcohol level at the scene was between .105 and .107 as tested by the Preliminary Breathalyser Test, her blood alcohol level could not have tested at .17 as the later analysis of the blood sample showed.

Having found sufficient evidence to defeat summary judgment on the issue of fabrication of evidence, the court finds that if the allegations are true, defendant Wince knew or should have known that tampering with evidence violates clearly established rights. Hence, defendant Wince is not entitled to qualified immunity on this issue.

On the excessive force claim, the court finds sufficient evidence to defeat summary judgment in that the jury could find plaintiff's constitutional rights under the 4th amendment have been violated by defendant Wince's actions in failing to follow the police department's policies on, handcuffing. This evidence, includes, but is not limited to, the fact that defendant Wince's counsel stipulated at oral argument that plaintiff was not a physical threat to defendant Wince. Further, it is undisputed that Wince knew that while plaintiff was handcuffed, she was hyperventilating because he took her to the hospital for this reason. Additionally, plaintiff offered evidence that the next day her wrists were bruised and scabbed over from the handcuffs.

The right to be free from excessive force is well established. The above evidence is sufficient for the jury to find that defendant Wince knew or should have known that the manner in which plaintiff was handcuffed was in violation of clearly established rights. The facts of this case do not present the scenario where the officer is faced with making a split-second decision and injury resulted as such. *See generally, Saucier v. Katz*, ___ S.Ct. ___, 2001 WL 672265 (June 18, 2001). Hence, the court finds defendant Wince is not entitled to summary judgment on his claim for qualified immunity on the excessive force claim.

Defendants' motion to alter or amend the Court's Order of June 29, 2001, (doc. #127-1) regarding claim preclusion on the fabrication of evidence and excessive force be, and it is hereby denied.

Defendants, however after the oral argument, filed a "Motion for Final and Appealable Order" (doc. # 147), to which plaintiff has no objections per the plaintiff's counsel. In said motion, defendants move this court to enter an order finding that the court's order of June 29, 2001 is final and appealable as to all claims regarding Susan Stemler. Specifically, defendants argued in their motion for summary judgment that Susan Stemler's three remaining claims (denial of equal protection based on selective prosecution; falsification of evidence; and excessive force) should have been dismissed due to the court's lack of subject matter jurisdiction under the Rooker-Feldman doctrine as to the denial of equal protection based on selective prosecution and that her claim for falsification of evidence and excessive force claims were barred under the doctrine of claim preclusion.

In its June 29, 2001 order, the court denied defendants' motion as to all of Susan Stemler's claims, but granted defendants' motion as the remaining claims in the consolidated action of Case #94-62 on the behalf of the Estate of Conni Black, *et al*, in which a notice of appeal was filed on July 18, 2001.

At the August 1, 2001 oral argument, the court indicated to the parties that it would deny defendant Wince's motion for qualified immunity, and defendants informed the court that they planned to take an interlocutory appeal. Since the companion case #94-62 is being appealed, coupled with the forthcoming interlocutory appeal of the court's decision on qualified immunity, defendants now request that the court designate all issues as final and appealable in the Susan Stemler case.

Defendants move this court for such an order arguing it has power to do so because Susan Stemler's issues are "inextricably intertwined" with the other matters over which the appellant court independently has jurisdiction. However, it is not for this court to make that determination. Instead, "[t]he doctrine of pendent appellate jurisdiction allows an appellate court, in its discretion, to exercise jurisdiction over issues that are not independently appealable when those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction." *Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 797 (6th Cir. 1998) (citations omitted) (emphasis added). Hence, this court lacks authority to do that which defendants ask and defendants' motion (doc. #147) is hereby denied.

Notwithstanding the foregoing, the court will state that in its view, the review of the foregoing issues by the Sixth Circuit would further sound judicial administration.

Regardless of the action taken by the Sixth Circuit on Susan Stemler's pendent claims, the defendants' having informed the court at oral argument that they intend to take an interlocutory appeal on the issue of qualified immunity on the claims of fabrication of evidence and excessive force, the court hereby stays this matter pending the appeal to the Sixth Circuit.

The court hereby **denies without prejudice** all pending motions in limine (**doc. #135-1, #137-1, #138-1**). The trial in the matter set for **August 13, 2001** is hereby cancelled. The parties shall submit a status report to the court within **ten** (10) **days** of the disposition of this matter in the Sixth Circuit.

Defendants' motion for leave to file an answer to plaintiff's second amended complaint (**doc. #130-1**) be, and it is hereby **granted**. The clerk shall file in the record defendants' tendered answer.

Plaintiff's motion to compel stipulations and meeting of the parties (**doc. #141-1**) be, and it is hereby **denied as moot**.

This 15th day of August, 2001.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN,
JUDGE

Nos. 01-5956/6205

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN STEMLER, Plaintiff-Appellee, WILLIAM CHIPMAN, ADMINISTRATOR OF THE ESTATE OF CONNI BLACK, Plaintiff-Appellant/ Cross-Appellee, RANDY BLACK, LEGAL GUARDIAN OF SHIANNE BLACK, Intervenor-Appellant/ Cross-Appellee, v. FLORENCE, CITY OF FLORENCE, Defendant-Appellee, BOBBY JOE WINCE, IN HIS OFFICIAL CAPACITY AS AN OFFICE [sic] OF THE FLORENCE POLICE DEPARTMENT, ET AL., Defendants-Appellees/ Cross-Appellants, RON KENNER, IN HIS OFFICIAL CAPACITY AS BOONE COUNTY SHERIFF, Defendant.	ORDER (Filed Feb. 20, 2004)

BEFORE: BOGGS, Chief Judge;
SILER and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

38 S.W.3d 387

Supreme Court of Kentucky.
CITY OF **FLORENCE**, KENTUCKY; Bobby Jo Wince; John Dolan; and Thomas Dusing, Appellants,
v.
William **CHIPMAN**, Administrator for the Estate of Conni Black, Appellees.
No. 1999-SC-0158-DG.
Feb. 22, 2001.
As Amended Feb. 26, 2001.

Hugh Skees, Florence, *Dave Whalin*, Landrum & Shouse, *R. Thad Keal*, Landrum & Shouse, Louisville, Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, Covington, Counsel for Appellants.

Eric C. Deters, Eric C. Deters & Associates, Ft. Mitchell, *Richard G. Meyer*, Deters, Benzinger & LaVelle, PSC, Covington, Counsel for Appellees.

WINTERSHEIMER, Justice.

This appeal is from an opinion of the Court of Appeals which reversed and remanded a summary judgment in a wrongful death negligence claim against three Florence police officers and their employer, the City of Florence.

The threshold issue is whether the circuit judge properly granted summary judgment on the negligence claim against the officers. The questions presented are whether the decision of the Court of Appeals abrogates the special relationship doctrine based on the events of this case; whether the application of *Fryman v. Harrison,* Ky., 896 S.W.2d 908 (1995), was proper; whether there was a special relationship between the officers and Black creating a duty to protect her from harm; whether the actions of the officers became ministerial once they allegedly took

Black into custody; whether there is an immunity defense; whether there was a superseding or intervening cause for the death, and whether principles of official immunity under Kentucky law and qualified immunity under federal civil rights law were properly considered.

Conni Black, her boyfriend, Steve Kritis, and Susan Stemler were patrons at a Florence bar on February 19, 1994. The evidence indicates that Kritis assaulted Black and she subsequently left with Stemler whom she had met that night while line dancing at the bar. Kritis followed the Stemler car and chased it through residential streets in the early morning hours. Ultimately the vehicles reached an intersection and were confronted by police.

Wince, a Florence police officer, joined other police at the scene and was assigned the task of handling Stemler who was tested for alcohol and arrested for DUI. Another officer, Boone County Deputy Sheriff Reuthe, initially determined that Kritis was not intoxicated although there was a smell of some substance at the scene. Deposition testimony by Reuthe indicated that he was familiar with DUI testing and that he had received commendations within his department in the previous four years for the most DUI arrests, and had taught at numerous seminars on DUI detection and investigation. He testified that he had conducted a type of sobriety test on Kritis while the subject remained in his pickup truck. The deputy said he observed Kritis for signs of intoxication such as nervousness, slurred speech, poor hand and eye coordination, failure with short term memory and inability to process information. He stated that Kritis responded without hesitation or difficulty to his questions and that he then determined upon observation that the demeanor, appearance and responsiveness of Kritis indicated that he was

not intoxicated so as to require additional sobriety testing. Ruethe stated that he had no reasonable articulable suspicion to remove Kritis from the vehicle. Reuthe also reported to Florence Police Lieutenant Dusing that Kristis told him that Stemler was a lesbian and had kidnapped his girlfriend.

Barker, an eye witness who had followed the chase, told the officers that Stemler was the wrong person to arrest and that Kritis was crazy. Barker would later characterize the officers as arrogant because they apparently dismissed his account and told him to leave the scene.

Black, who appeared to be drunk, remained seated in the Stemler automobile. Outside of her presence, Lieutenant Dusing directed Officer Dolan to arrest her for public intoxication unless she decided to leave with Kritis. A careful review of the record indicates that no threat of arrest was ever communicated to Black by the police if she refused to accompany Kritis. The officers escorted her from the Stemler automobile when she told the police that she wanted to "go with the guy in the truck." Although she appeared to be intoxicated, Officer Dolan determined that she was competent enough to make the decision to leave with Kritis. When Black was unable to unfasten her seatbelt in the Stemler automobile because it had become jammed at the latch, Deputy Alsip helped her unfasten it. Alsip testified that Black "stepped out of the car." An exhaustive study of the extensive record in this case indicates that Black, without physical assistance from anyone, walked to Kritis' truck and entered it while the Boone County deputy held the door open for her. Even Barker admits in his deposition testimony in three separate places

that Black went willingly and unassisted to the Kritis truck.

Kritis testified that as they drove away, Black started an argument with him, hit him in the head with a drywall tool she found on the front seat and then grabbed the steering wheel causing him to lose control of the truck and strike a guardrail. Black was partially ejected from the truck and suffered a fatal injury. Erlanger police responded to the accident scene, and they arrested Kritis who was later determined to be legally intoxicated at the time of the accident with a blood alcohol level of .115 as a result of a blood test. Kritis testified that he was driving at 65 miles per hour when the accident occurred.

Chipman, as Black's Administrator, filed both a federal civil rights claim and a state court negligence action against the city and various police officers involved in the initial stop of the Stemler and Kritis vehicles. Summary judgment was granted by the federal district court but was reversed by the Sixth Circuit Court of Appeals. Similarly, in the state claim, the circuit judge granted summary judgment which was then reversed by the Court of Appeals. The United States District Court placed the federal action in abeyance because of the pending jurisdiction of this Court. We accepted discretionary review.

I. *Special Relationship*

a. Summary Judgment Review

The summary judgment procedure authorized by CR 56.01 et seq., is intended to expedite the disposition of cases, and if the grounds provided by the rule are established, it is the responsibility of the trial court to render an

appropriate judgment. The grounds for such a judgment are: 1) there is no genuine issue as to any material fact, and 2) the moving party is entitled to a judgment as a matter of law. As originally noted in *Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d 255 (1985), and later in *Steelvest, Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476 (1991), as well as *James Graham Brown Foundation, Inc. v. St. Paul Fire and Marine Insurance Co.,* Ky., 814 S.W.2d 273 (1991), the summary judgment procedure is not a substitute for trial.

The circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances. *Steelvest, supra,* originally stated that the test would include the phrase "impossible" for the nonmoving party to prevail at trial. Later, this Court clarified that the word "impossible" is used in the practical sense, not the absolute sense. *Perkins v. Hausladen,* Ky., 828 S.W.2d 652 (1992). The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial. It bears repeating that this Court stated in *Hoke v. Cullinan,* Ky., 914 S.W.2d 335 (1995), that:

> contrary to the view of some, our decision in *Steelvest* . . . does not preclude summary judgment. Provided litigants are given an opportunity to present evidence which reveals the existence

> of disputed material facts and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate.

The approach to summary judgments in the state court is different from that in the federal court. The Court of Appeals in its opinion said that its recitation of the events relevant to these appeals draws heavily upon the Sixth Circuit opinion of Judge Boggs in *Stemler v. City of Florence,* 126 F.3d 856 (6th Cir.1997). That appeal was before the Sixth Circuit Court of Appeals pursuant to F.R.C.P. 12(b)(6). The description of the situation in the federal court opinion was based on the allegations contained in the original federal complaint. The focus of the *Stemler* federal appeal was in regard to the sufficiency of the pleadings to state a cause of action for constitutional harm because it was based on the federal civil rights action. There is a significant difference between the standards used in determining a federal rule 12(b)(6) matter, and a summary judgment in state court. *See CSX Transp., Inc. v. Marquar,* 980 F.2d 359 (6th Cir.1992). We are not persuaded by citation to the record of the federal appellate court in considering our review of the Kentucky Court of Appeals decision. The facts or events recited in the Stemler case in federal court and so completely relied on by our Court of Appeals are totaly unsupported by the record in this case and contradictory to the sworn testimony of all the witnesses in this case. The statements about custody are not supported by our review and analysis of the deposition testimony in the record.

In this proceeding, the summary judgment was based on a fully developed record, including extensive deposition testimony of all the witnesses who were involved in the events described in the Kentucky action. The Kentucky

Court of Appeals misconstrued the events as recited in the federal Court of Appeals decision. This is of critical importance in determining whether a special relationship existed between Black and the three police officers. As noted by the circuit judge, there are numerous disputes with respect to ancillary facts but there exists no genuine issue with respect to the facts material to the legal principles supporting the summary judgment which was granted. The facts relied upon by this Court are those found in the deposition testimony in this record and used by the circuit judge in his determination of summary judgment.

There is no evidence in the deposition testimony that Black was lifted or placed in the Kritis truck. She was not in custody or otherwise restrained as a result of the conduct of the police officers.

We are persuaded by the analysis found in *City of Sunnyvale v. Superior Court of Santa Clara County,* 203 Cal.App.3d 839, 250 Cal.Rptr. 214 (1988), which held that police officers who had stopped an automobile for an alcohol related traffic matter were not liable in tort when they allowed the occupants to proceed. The California court stated that there is no duty to control the conduct of another or to warn those endangered by such conduct in the absence of a special relationship. Mere presence in a stopped vehicle does not establish any protective duty toward a passenger to be imposed on the officer. Similarly, in *Jackson v. Clements,* 146 Cal.App.3d 983, 194 Cal.Rptr. 553 (1983), the fact that the officers undertook to investigate and observed the intoxicated condition of some, did not create a special relationship which imposes on the officers a duty to control the citizen's subsequent behavior. *See Hernandez v. City of San Jose,* 14 Cal.App.4th 129, 17

Cal.Rptr.2d 589 (1993). *See also Jones v. Maryland National Capital Park and Planning Com'n,* 82 Md.App. 314, 571 A.2d 859 (1990), in which the Maryland court held that there was no special relationship so as to create a duty on the part of an officer to protect third parties arising out of either an investigatory traffic stop, or its resulting brief detention.

The mere fact that the police told Black to remain in the Stemler automobile while the police were taking control of the investigation scene does not rise to the level of custody or "being otherwise restrained." A brief detention at a traffic stop does not create the relationship of custody. *See City of Sunnyvale, supra.*

Although there may be a vigorous argument regarding the description of the events, it does not alter the testimony found in the depositions. The circuit judge correctly considered that testimony and on review, we find that he was correct in determining that there was no genuine issue as to any material fact and that the movant was entitled to a judgment as a matter of law. CR 56.03. It is unfortunate that the description of the events in the federal complaint is at variance with the sworn deposition testimony in the record. The unquestioning and uncritical adoption by the Kentucky Court of Appeals of the description of such events in the complaint was unfortunate and in error.

Our review of the lengthy record in this case causes us to conclude that the Court of Appeals was in error when it determined that Black was in custody and that the officers had a duty to protect her from third-party harm. The facts as considered by the circuit judge in granting summary

judgment are that Black remained in the Stemler automobile during the traffic investigation stop and that she asked to leave the scene with Kritis. She also walked on her own to the Kritis truck despite being intoxicated. She was not physically placed in the vehicle by any of the police officers and she was not given a threat by any of the officers either to leave with Kritis or face arrest. The consequence is that Black was never in custody or otherwise restrained so as to give rise to a special relationship between the police officers and Black. There is no evidence in the record from which it can be concluded that Black was in custody by the police or any state actor at the time the pickup truck struck the guardrail. Kritis testified by deposition that within minutes of leaving the police stop, "Black woke up and went haywire." He states that she began hitting him which led to his hitting her in return and losing control of the truck. The truck swerved to the right and collided with a guardrail. The impact threw Black partially out of the passenger side window and her head and an arm were completely severed from her body. Erlanger police charged Kritis with manslaughter and he eventually pled guilty to reckless homicide.

In order for a claim to be actionable in negligence, there must be the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers to Black to protect her from crime or accident. In order for the special relationship to exist, two conditions are required: 1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor. *Cf. Fryman v. Harrison, supra; Ashby v. City of Louisville,* Ky.App., 841 S.W.2d 184 (1992). Neither of

these factors can be found from the undisputed material facts in this case. There is no evidence from which it can be ascertained that Black was in state custody or otherwise restrained by the police at the time the pickup truck struck the guardrail with the fatal result. In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers.

II. *Court of Appeals Legal Determination*

The Court of Appeals erred in its determination that there was a special relationship between the police officers and Black which created a duty to protect her from harm. The circuit court correctly determined that there was no evidence of custody or other restraint at the time of the accident which was perpetrated by a state actor. Black was unable to establish the elements of a special relationship pursuant to *Fryman,* and thus her claims that the officers breached a duty to protect her fails as a matter of law.

It is a question of law whether Black was in custody so as to establish a special relationship. The record indicates that the police officers did not exercise sufficient control over Black to establish that she was in custody. The fact that she was a passenger in a motor vehicle stopped in a police investigation did not establish custody. The evidence indicates that the officers did not make any threat of arrest to Black or in any way attempt to coerce her decision as to how she would leave the scene of the traffic investigation. Black repeatedly requested that she be allowed to leave the scene with Kritis, her boyfriend. She walked unassisted to the Kritis truck and thanked an

officer for his courtesy in holding the door for her. The officers did not make any representations concerning whether or not she should leave with Kritis, nor did they indicate that they would protect or assist her in her decision in any way. The officers did not voluntarily assume any duty to protect Black.

We agree with the officers that imposing a duty in this case in the absence of a special relationship as required by *Fryman* would be tantamount to establishing a universal duty of care on the police to prevent any third party harm to each and every citizen with whom they have contact regardless of how slight the interaction or brief the duration. As argued by the officers, the result would be exactly what the Court of Appeals suggested which would be to avoid potential liability, officers will simply drive past situations they encounter instead of stopping or investigating. Such a result is not in the public interest and is not required by the law.

We are persuaded by the analysis provided by *Ezell v. Cockrell,* 902 S.W.2d 394 (Tenn.1995), which indicates that persons who serve the public must be allowed to carry out their function without fear of having to answer for harm caused to an individual by events which are outside the control of the public official. Public officials are not an insurer of the safety of every member of the public, nor are they personally accountable in monetary damages only because the individual is a public official charged with a general duty of protecting the public.

The imposition of a universal duty of care severely reduces the ability of those public officials to engage in any discretionary decision-making on the spot. There is a danger of substituting the legal concept of "foreseeability" for "custody" as the threshold in establishing a special

relationship. *Cf. Holson v. State,* 99 Md.App. 411, 637 A.2d 871 (1994). In that case it was held that an officer did not owe a duty to protect an inebriated passenger following the arrest of the driver of a vehicle for alcohol related driving. The inebriated passenger was left at the scene of the traffic stop and apparently walked into the path of a vehicle and was struck. The Court held that "being intoxicated . . . does not create a special relationship."

The Kentucky Court of Appeals incorrectly analyzed the situation when it stated that a degree of discretion became ministerial once Black was in custody. Our examination of the record indicates that the circuit judge was correct in determining that Black was never in custody. The observation by the Court of Appeals that "had the officers simply driven past the scene and refused to stop, there would not have been a restraint on Black's freedom" is difficult to reconcile with any concept of public reliance on police and other public officials to assist or at least investigate during a time of difficulty. The reliance by the Court of Appeals on foreseeability only to create a duty essentially deprives all public officials, including police, of the ability to make an honest mistake of judgment. We must reject the attempt by the Kentucky Court of Appeals to establish a universal duty of care for all public officials.

The better standard is the one enunciated in *Fryman* that before addressing foreseeability a court must first determine that there is a duty owed by public officials. Foreseeability does not create a duty. Rather, duty can only be created by showing the existence of a special relationship between the individual and the public official.

As noted earlier, *Fryman* and *Ashby, supra,* require that the victim be in custody and that the violence or other

offensive conduct be perpetrated by a state actor. Foreseeability of harm arises only after the establishment of the existence of a duty.

III. *Superseding or Intervening Cause*

Even if custody were established in this case, the fighting between Kritis and Black while driving on I-75 which resulted in the car crashing into the guardrail with fatal consequences for Black was outside the control of the police officers who made the earlier stop. In *Fryman,* this Court reinforced the concept that a superseding cause will, as a matter of law, destroy the connection between the indirect harm to an individual and the alleged omissions of a public official. "The question of whether an undisputed act or circumstance is a superseding cause is a legal issue for the court to resolve and not a factual matter for the jury." *Fryman,* at 911. It is clear from the record that there existed a superseding intervening cause which was wholly outside the control of the police officers.

In light of our determination that custody was not established in this case we need not decide whether the officers were entitled to official immunity.

The decision of the Court of Appeals is reversed, and the summary judgment of the Boone Circuit Court is reinstated.

LAMBERT, C.J., *COOPER*, *GRAVES*, *JOHNSTONE*, *KELLER* and *WINTERSHEIMER*, JJ., concur.

STUMBO, J., dissents from the grant of summary judgment.